No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY (a corporation),

Appellant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (a corporation), and the UNITED STATES OF AMERICA, as claimant of the American Ship "MONONGAHELA", her engines, tackle, apparel, etc.,

Appellees.

BRIEF FOR APPELLEES.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
FARNHAM P. GRIFFITHS,

Proctors for Appellees.

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BRIEF FOR APPELLEES.

This was an action for the loss of a lighter orally chartered by the appellant to the appellees in December, 1919, for use in unloading 400 tons of sand ballast from the "Monongahela". The issue in the case is whether or not the damage to the lighter was caused by the charterers' (appellees') negligence. The libelant has appealed from the order of the District Court dismissing the libel. The parties will hereafter be referred to as libelant and respondents or as appellant and appellees.

We beg to state at the outset that we cannot concur in libelant's suggestion (brief for appellant, p. 11) that "the last word of law upon the effect of such a demise of a lighter is set out by the Circuit Court of Appeals for the Second Circuit in *Schoonmaker-Connors Co. v. Lambert Transportation Co.,* 262 Fed. 102 (July 3, 1920)". The "last word" we believe is in *Hildebrandt v. Flower Lighterage Co.,* 277 Fed. 438, where the Circuit Court of Appeals for the Second Circuit affirms Circuit Judge Mack's decision, rendered, as he says in the opening sentence, for the very purpose of giving the parties a full opportunity for review, and printed on the page of the 277th Federal immediately preceding the affirmance by the Circuit Court of Appeals. Judge Dooling's decision in the case at bar is, almost as if by prescience, squarely within the law as thus declared only last November and published in the Federal Advance Sheets of March 23rd, 1922 (277 Fed. 436 and 438); as it is also fully sustained by the decision of the United States Circuit Court of Appeals for the Second Circuit in *Hastorf Contracting Co. Inc. v. Standard Oil Co., of New Jersey,* 272 Fed. 884, rendered April 13, 1921, and thus some nine months after the decision of the same court in the *Schoonmaker* case supra. Nor for that matter do we believe that Judge Dooling's opinion and decision in the case at bar is in anywise at variance with the law as declared in the *Schoonmaker* case if the part of that case be read, which counsel for libelant has *not* quoted and which we think states the law as applied to the facts of the case at bar rather than the passage which counsel *has* quoted and which

we think either states the law for another state of facts or, as shown by the later above mentioned decisions of the same court, either states it erroneously or, for the facts of the case now before this court, too broadly.

These suggestions will be developed in our discussion of the law under heading II below. They are mentioned here because we wish to controvert, at the outset, the suggestion that the *Schoonmaker* case on which libelant in chief part builds its brief is the last word of law on the issues involved in this appeal, even for the Circuit in which it was rendered.

Statement of Facts.

The American bark "Monongahela" was a United States Shipping Board vessel owned by the United States and operated for the Shipping Board by the firm of Struthers & Dixon of San Francisco. She came to San Francisco from Manila in ballast to take on cargo. On Monday, December 8, 1919, her operators orally chartered a lighter from the Crowley Launch and Tugboat Company to take 400 tons of ballast from the "Monongahela". Pursuant to the agreement for the hire of a lighter, the Crowley Company towed the "Crowley 76" over to the "Monongahela" Tuesday evening and made her fast to the ship. The "Crowley 76" was the next to the oldest barge in the Crowley Company's fleet. She was of wood, a flat frame-built barge, one hundred and twenty feet in length with a thirty-six foot beam and eight or nine feet deep. Empty

she drew a foot of water; loaded with 400 tons she drew five feet.

The discharge began on Friday morning and continued all that day, all Saturday, Sunday, Monday and up to about 3:30 Monday afternoon. The ballast was dug out of the lower hold and shoveled into buckets, which were raised and swung over the ship's side and the contents dumped on the lighter. A donkey-engine on the dock furnished the power for swinging and dumping the buckets. The sand was piled in cones, the first cone being piled a little forward of the center, and the work moved aft. To secure an even distribution of the load the lighter was shifted from time to time to build up other cones. By Monday afternoon there were four large cones and one smaller one. The stevedores were a gang of strike breakers employed because of the stevedore strike then pending in San Francisco, but they were in the employ of the San Francisco Stevedoring Company, a company which had had occasion to load barges with sand hundreds of times in San Francisco harbor, and the job was superintended by the superintendent of this company, James Woodside. The work of discharge and the handling of the lighter was scrutinized from time to time by representatives of the Crowley Company. On Saturday afternoon about 2 o'clock, the second day of loading, Mr. Wilder, the barge superintendent of the Crowley Company, was down on the dock and watched the loading of the barge for a time. James Sennott was the outside man of the Crowley Company. It was his business to watch the lighters and barges belonging to the

Crowley Company while they were in service at various docks and points around the harbor and to see that nothing went wrong with them. He was on the "Crowley No. 76" on Saturday and Sunday while loading was going on. He was on the barge on Saturday, and departed without making any criticism or suggestions to the stevedoring company or to the men in charge. Again on Sunday morning he observed the loading from the "Monongahela's" decks, saw what was being done, the methods of piling the ballast and trimming the barge, and apparently approved, for he departed without offering any suggestions or criticism. By this time the greater part of the loading was finished.

Up to four o'clock Monday afternoon the "Crowley No. 76" seemed to be in good condition. At that time the loading of the sand was completed and the stevedores were piling rubbish from the ship's hold on the top of the cones. At about four o'clock David Crowley of the Crowley Company, happened to be going along the waterfront and noticed, he said, that the barge was listing to starboard. He telephoned to John Wilder, the barge superintendent of the Crowley Company that the lighter needed to be straightened. Wilder arrived about 4:10 and on going into the hold found that the seams had opened up on the starboard side and that the water was coming in through her seams. The lighter was equipped with hand-pumps but Wilder telephoned for a big pump, a 4-inch centrifugal pump, as the most effective means of relieving the situation. Before the pump was put into use and without attempt

being made to use the hand-pumps, the barge capsized, the sand slipping outward away from the ship, and the barge turning bottomside up against the "Monongahela". This was about 4:40. The lighter was a total loss.

The libel filed against the ship set forth the delivery of the barge in good order and condition and the failure to redeliver her in that condition and alleged that her loss was due to the negligence, acts, omissions and defaults of the respondents. The answer denied that the loss was due in anyway to fault or neglect on the part of the respondents and set forth the unfitness of the lighter for the particular purpose for which she was chartered, namely, the carriage of 400 tons of sand ballast from the "Monongahela", and alleged that the loss was due solely to the perils necessarily incident to the service for which the lighter was hired.

The Decision of the District Court.

The witnesses for the most part testified in open court and the case was submitted on briefs. The applicable rules of law were drawn to the Court's attention in the briefs and the authorities fully cited. The Court's opinion is brief and is concerned only with the facts of the case. It is as follows:

> "It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge being old, made

more water than usual, and that this was the cause of her loss.

The libel will therefore be dismissed." (Apostles, p. 292.)

A longer opinion would perhaps have shown more elaborately the working of the court's mind, but it is clear from the opinion as it is that the court was concerned only with questions of fact, the law being clear, and that upon the issues of fact before it the court held with the respondents. The court found that it was not established that the barge was overloaded and found that she was properly loaded. If she was not overloaded and if she was properly loaded the unescapable inference is that the barge was not suitable for the service for which she was hired. For damage due to such a cause the respondents were not liable under well established rules of law.

Libelant in its brief has referred to a circumstance outside the record (brief page 10). It is there pointed out that the court made no findings in addition to the opinion, and it is said

> "the respondents represented a form of decree to the court in which the court was to find that the barge was not overloaded and that it was properly loaded and that the loss was caused by the unseaworthiness of the barge. This decree the court refused to sign and left the grounds of its decision as stated in the opinion."

Lest this court misapprehend the situation, we shall complete the libelant's out-of-the-record reference. We presented to the court for signature a form of decree containing formal findings of fact resembling some-

what findings of fact in law and in state practice. Thereupon libelants presented a form of decree with a memorandum reading as follows:

> "The decree proposed by the respondents reads in part:
>
> > 'and the court having filed its opinion herein holding and deciding that the loss of the barge referred to in said libel was due solely to her unfit condition for the service for which she was hired by claimant and respondents and that said loss of said barge was not in any respect due to any fault, neglect, act or omission of said claimant and respondents, and ordering that the libel be dismissed.'
>
> This description of the opinion is inaccurate. The only opinion rendered by the court in this case reads:
>
> > 'It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss. The libel will therefore be dismissed.'
>
> It is, of course, unnecessary to describe the opinion in the decree, and the decree could properly read: 'and the court having filed its opinion herein and having ordered that the libel be dismissed.'
>
> If, however, the opinion is described in the decree, obviously the description should be correct. In case the court describes the opinion in the decree, we suggest the words:
>
> > 'and the court having filed its opinion herein, holding and deciding that it was not established that more sand was loaded on the Barge No. 76 than she was chartered to carry, and that the method of loading was not improper, and deciding that it was just as likely that the barge, being old, made more water

than usual, and that this was the cause of her loss, and ordering that the libel be therefore dismissed.'

This description of the opinion is practically in its own words, and hence correct."

On receipt of the foregoing we presented the following memorandum:

"It has been our view that findings should not go into admiralty decrees. That is not the practice elsewhere. In recent years, however, findings have been embodied in admiralty decrees by other proctors here and we have sometimes wondered whether we ought not also to propose findings if that practice is to be approved here at all. There were elaborate findings, for example, in the 'Santa Rosa' case and brief findings in the 'Aggie' case.

If the court is willing to entertain proposals of findings, we should like to have it consider those included in the decree we submitted in this case, which meet the issues as presented in the pleadings. If not (and we are frank to say that we should prefer to have the court follow the practice elsewhere prevailing of not embodying findings in admiralty decrees), we are content that the decree proposed by libelant should be signed.

It is probably true that the findings should in any case have been embodied *as such* in the decree we proposed rather than as a description of the opinion. The question is one of form and the enclosed draft of decree meets libelant's criticism.

We repeat, however, that if the court should be disposed to adopt as the general rule the practice of making no findings in admiralty decrees, we should prefer that; and in that event we should not, of course, ask findings here and the form of decree proposed by libelant should be signed."

These were the circumstances under which the decree proposed by libelant *without* findings was signed and

under which there occurred the so-called "refusal to sign" the decree *with* findings which we had originally proposed.

The District Judge saw and heard most of the witnesses in open court. Of the twenty-six witnesses who testified, five testified by deposition, one testified both by deposition and in court, and the remaining twenty testified in open court. There was no particular issue in the case covered solely by deposition so that as to such issue the Court of Appeals could weigh the evidence as well as the trial court. There was *viva voce* testimony as to the amount of ballast loaded on the barge as well as the testimony taken by deposition; and the same is true as to the issue whether the barge was properly loaded.

The evidence was sharply in conflict upon the question whether or not the loss was caused by the respondents' (appellees') negligence. The Court believed and accepted the respondents' theory of the case. It is superfluous for us to lengthen this brief by reference to the innumerable cases applying the rule that the decision of a trial court upon questions of fact based upon conflicting testimony and involving the credibility of witnesses examined in the presence of the trial court is entitled to great respect and will not be reversed by the Court of Appeals unless manifestly contrary to the evidence.

We shall consider, first, the principles of law applicable to the case, and, secondly, the evidence upon which the trial court based its decision in dismissing the libel.

I.

THE LAW OF THE CASE.

This appeal is primarily from the trial court's decision upon the facts. It does not involve a mistake of law by the trial court, for there was no mistake; or disregard of the law owing to counsel's failure to draw the court's attention to the applicable principles. The case was elaborately briefed on both sides. Nor does the case involve a refusal of the court to apply the law, for there was no refusal. Libelant has argued as the chief ground for reversing the case an alleged mistake of law by the trial court as to the burden of proof resting upon the parties. We can show we believe that the Court applied a rule upon the burden of proof strictly in accord with the authorities and with the authorities from the very circuit which libelant invokes to support its contentions.

(a) The respondents were bailees, not insurers of the lighter.

The relation between the owner and the charterer of the "Crowley 76" was that of bailor and bailee, and in the absence of express contract there was no obligation on the charterer to return the lighter in the same condition as when received. Speaking of the liability of the charterer as a bailee, the court said in

Lake Michigan Car Ferry Trans. Co. v. Crosby, 107 Fed. 723:

> "Under the general rule of bailments, the bailee is not liable for loss without his fault; and no sound reason appears for excepting a charter party from such rule unless the liability as insurer is

based on a provision stronger than the mere covenant for a return of the property at the end of the term a covenant which is clearly implied without expression."

And the same rule was announced in

Killam & Co. v. Monad Engineering Co., 216 Fed. 438:

"No more is now necessary than to state the principles by which the court has been guided. One is that in contracts of this kind the owner of the boat warrants her to be seaworthy and fit for the use to which she is intended to be put. Another is the general principle that a bailee for hire is not responsible for loss or damage, except such as may be brought about through his fault or by his negligence. This general principle is applicable to contracts for the hire or demise of vessels."

(b) The respondents, as bailees were not liable for injuries not caused by their negligence. They were not responsible for loss resulting from damages incident to the use of the bailed chattel.

As a bailee of the "Crowley 76" the respondents were liable only for negligence. They were not responsible for losses resulting from accident, from unseaworthiness, from dangers incident to the use of the lighter or for the unfitness of the lighter for the work for which she was chartered.

Killam & Co. v. Monad Engineering Co., supra.

Darby Candy Co. v. Hoffberger, 73 Atl. 565 (Md.).

The court speaking of the relation of bailor and bailee said:

"In all of these cases the rule is distinctly established that the onus of proving want of reasonable

and proper care is on the bailor and that the bailee is not liable for an accidental injury not caused by negligence. And this is so because bailees for hire are not insurers of the bailed property."

Fireman's Fund Ins. Co. v. Schreiber, 135 N. W. 507:

"A contract of bailment, in the absence of special situations to the contrary, involves, by necessary inference, an understanding that the bailee may use the usual means of executing the agreement." (Headnote No. 3.)

Alder v. Grand Lumber Co., 81 Pac. 385 (Ore.):

"When the plaintiff hired these animals to the defendant for logging purposes, he of course assumed all the ordinary risks that are incident to such employment; and if they were killed or injured without the fault or negligence of the defendant or its agents or servants plaintiff cannot recover * * * ."

That these well settled principles of law are applicable will not, we think, be questioned in this case. A third principle resulting from the first two is equally clear—but as to this we think the libelant is urging upon the court an erroneous construction of the rule.

(c) The burden of proof.

Libelant seriously urges that delivery of the barge in good condition to the charterer and return in bad condition makes a prima facie case for the owner such that the charterer is bound to prove the exact cause of the loss of the lighter; and that, having proved such cause of loss, the charterer is then bound to proceed further and show that it did not come about through his negligence.

This rule is nothing more nor less than the rule applicable to an insurer. Wherein does it differ from the rule governing the liability of a common carrier? Delivery in good condition and return in bad condition, says libelant, throws the burden on the charterer (carrier) to explain the cause and to negative negligence on his part causing the loss; failing to show the cause of the loss, the charterer (carrier) is liable. Is there any difference between this liability and that of a common carrier who is an insurer? And yet we start out with the rule stated and approved by all the authorities that the bailee is *not* an insurer and therefore is *not* under an insurer's liability.

We think that the manifest contradiction between the first rule stated above and the rule regarding the burden of proof for which the libelant is contending comes about through a misuse, or at any rate loose use, of the term "burden of proof" often indulged in by courts and lawyers. The duty of going forward with the evidence is one thing, and the burden of proof, in the true sense of the word, is another. Strictly speaking, the burden of proof never shifts—it is always on the plaintiff—whereas the duty of going forward with the evidence frequently shifts from one party to the other as the case progresses. The distinction has been brilliantly discussed and explained by the late James Bradley Thayer in his *Preliminary Treatise on Evidence,* p. 355 and following.

> "In legal discussion", says Thayer, "this phrase 'the burden of proof' is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are

at issue,—who will lose the case if he does not make this proposition out, when all has been said and done. In saying the 'peculiar duty', I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion. (3) There is an indiscriminate use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others." * * *

Pointing out the difference between the duty resting on the plaintiff and the defendant, Thayer goes on to say:

"In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who in admitting his adversary's contention and setting up an affirmative defense, takes the role of *actor* (*reus excipiendo fit actor*), must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law. But he, in every case, who is the true *reus* or defendant holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him. He has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right; indeed he may probably be in the wrong, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome; because the actor has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt." * * *

Then he proceeds to show that in the true sense of the word the burden of proof is always with the plaintiff.

> "Whatever the standard be, it is always the *actor* and never the *reus* who has to bring his proof to the required height; for, truly speaking, it is only the *actor* that has the duty of proving at all. Whoever has that duty does not make out a *prima facie* case till he comes up to the requirement, as regards quantity of evidence or force of conviction, which applies to his contention; and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here as well as at Rome, cannot shift; it is always the duty of one party, and never of the other."

The meaning of the term "shifting of burden of proof" he explains thus:

> "But as the *actor,* if he would win, must begin by making out a case, and must end by keeping it good, so the *reus,* if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, as has been said already, the thing that thus shifts and changes is not the peculiar duty of each party—for that remains peculiar; i. e., the duty, on the one hand, of making out and holding good a case which will move the court, and on the other, the purely negative duty of preventing this. It is the common and interchangeable duty of going forward with argument or evidence, whenever your case requires it."

That there is ambiguity in the use of this term is only too plain. Thayer says:

> "There is much ambiguity in what is said of the 'shifting' of the burden of proof. As to this it is vital to keep quite apart the considerations applicable to pleading, and those belonging to evidence. We see that the burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the *actor,* and never shifts. As we have only one phrase for two ideas belonging to two different subjects, we say, as it happens, that the burden of proof does, and does not shift."

Wigmore, in analyzing the first meaning of "burden of proof" uses the phrase "risk of non-persuasion".

> *Wigmore on Evidence,* Sec. 2485:
>
> "*Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. * * *
>
> "The risk of non-persuasion, therefore, i. e., the risk of M's non-action because of doubt, may properly be said to be upon A. This is the situation common to all cases of attempted persuasion, whether in the market, the home, or the forum."

With these clarifying distinctions one may helpfully point the discussion of the case at bar.

The libelant had the burden of proving its right to recover damages from the respondents; that is to say, it was for it to prove the negligence of the respondents which caused the loss of the barge, and upon it was the risk of non-persuasion. If and as libelant proved the good condition of the "Crowley 76" and its delivery to the respondents in such condition and the loss of the lighter while in the respondents' possession it made a prima facie case and threw upon the respondents the duty of going forward with the evidence. It was for the respondents then to offer testimony regarding the handling and the use of the barge while in its possession.

The lighter was chartered to carry a certain quantity of sand ballast. *Conceivably* a greater quantity might have been loaded, and *conceivably* the sand might have been improperly loaded. To show the quantity of ballast loaded and the manner of loading it on the barge was the duty of respondents in refuting such prima facie case as was made out by the libelant. The record shows that these were the chief issues in the case. Other matters, for instance the method of mooring the lighter to the bark were also considered. Upon charges of negligence in these various respects libelant as well as respondents offered testimony.

When all the evidence was in, what was the situation? The evidence offered by the respondents that the lighter was not overloaded and was properly loaded was believed and accepted by the trial court, and the court drew the inference that the loss was probably

the result of some leak in the barge due to an inherent cause.

Nevertheless, libelant protests that the respondents should have been held liable for the reason that they have not shown to a certainty the exact cause of the loss. Where, in the true sense, was the burden of proof? Libelant urges upon this court that the burden was upon the respondents to show the exact cause of the loss of the lighter, and in default of showing that cause to pay its value to the libelant. This would dispense entirely with Thayer's "peculiar duty of him who has the risk of any given proposition", and would be absolutely at variance with the authorities hereinafter cited on the law applicable to charterers as bailees.

As we said at the outset, libelant cites in support of its contention a decision of the Circuit Court of Appeals of the Second Circuit, as "the last word of law" upon the subject:

Schoonmaker-Conners Co. v. Lambert Transportation Co., 268 Fed. 102 (July 3, 1920).

In the first place it is to be observed that the quoted passage (appellant's brief p. 12) is pure dictum, for it was declared by Judge Rogers in a passing reference to an admitted and non-contested liability, not on any issue.*

* The Schoonmaker case was one in which a wooden scow was chartered to the respondent and was returned with her decks and sides eaten by a powerful acid. The evidence showed, practically without contradiction, that a sub-charterer had placed twelve hundred drums of caustic soda on the scow's deck and left it uncovered for fifty days, exposed to rain and snow. The acid leaked from the drums and corroded the decks of the barge. It also appeared that the sub-charterer's attention was very early called to the dangerous character of the cargo, and the risk of serious damage to the boat unless the acid was covered. This is a case, therefore, where a known cause of damage was shown to have come about through gross negligence on the part of a sub-bailee.

In the second place, even as dictum, it was stated only as the law applicable where

> "the charter party contained a covenant wherein it was agreed that the scow was to be returned in like condition as on delivery, reasonable wear and tear excepted".

And in the third place Judge Rogers stated expressly in a paragraph on the same page with that quoted by counsel for libelant that

> "it is settled law that, where a charter party contains no covenant for the return of a vessel in good order and condition, there is no liability for injury to the vessel without proof of negligence" (268 Fed. page 104).

There was no such covenant in the case at bar, so counsel cites only the rule as declared for the case of a charter party where the covenant is express, and then discarding the part of the *Schoonmaker* case which declares the rule where the covenant is not express, resorts to an earlier case (*Charles Killam & Co. v. Monad Engineering Co.,* 216 Fed. 438) for a dictum (and it is only dictum, for in that case the covenant *was* express) that the covenant if not expressed is nevertheless implied. If the *Schoonmaker* case is to be taken as the law and the "last word of law" on the subject counsel ought at least to follow it through.

We cannot believe that, even for the case of an express covenant to return in good order and condition, Judge Rogers intended in the passage counsel quoted, by libelant, to impose the obligations of an insurer on the bailee; and we submit that the dictum, even as dic-

tum, is too broad if construed literally to that extreme and as literally imposing liability on the bailee of a barge to pay for her loss if he cannot show the exact cause of the loss, and that it was not his negligence. That Judge Rogers certainly intended no such construction of the law for bailment of barges generally, and for a case like that at bar, is conclusively shown, we think, by the fact that he participated in the affirmance by the Circuit Court of Appeals for the Second Circuit (277 Fed. 438) of Judge Mack's opinion in *Hildebrandt v. Flower Lighterage Co.* (277 Fed. 436). And that the other two judges who sat in the *Schoonmaker* case (Judges Ward and Hough) have not so construed the law, is shown by the fact that they both participated in the opinion in *Hastorf Contracting Co. v. Standard Oil Co.,* 272 Fed. 884, Judge Hough indeed writing the opinion.

That opinion was rendered April 13, 1921. The facts bear a strong resemblance to the case at bar. It appeared that a wooden scow was chartered to receive a cargo of pyrites from the steamer "Werribee". Loading continued during the greater part of two days.

In the afternoon of the second day the scow began to leak and to settle to port. Pumping was unavailing and the scow capsized, dumping her cargo and receiving serious injuries. The issue in the case was whether the barge was properly loaded, the fact that she was not overloaded being conclusively proven. The case was tried in open court, about twenty witnesses were examined, and the trial court dismissed the libel without rendering an opinion. Passing over the issue in the

case at bar as to the overloading of the lighter, we ask the observation of the court to the facts in the *Hastorf* case and the facts in the case at bar in juxtaposition:

Hastorf Case.	Case at Bar.
1. An unexplained leak followed by a list and capsizing;	1. An unexplained leak followed by a list and capsizing;
2. A charge of negligence in the loading of a vessel by the charterer;	2. A charge of negligence in the loading of a vessel by the charterer;
3. Conflicting evidence offered in open court upon this issue;	3. Conflicting evidence offered in open court upon this issue;
4. The issue as to the propriety of the loading resolved in favor of the respondent;	4. The issue as to the propriety of the loading resolved in favor of the respondent;
5. The court resorted to the inferenee that the scow had leaked from inherent defects.	5. The court resorted to the inference that the scow had leaked from inherent defects.

We quote pertinent passages from the court's opinion (page 885):

> "The record discloses no debatable proposition of law; it being admitted that the unexplained leaking or the sudden capsizing of any vessel in quiet waters is evidence from which unseaworthiness may be inferred. Equally is it admitted that a good deck scow may be so loaded with such a cargo as pyrites as to cause strain and consequent leaking, and furthermore it is well known that when any laden deck scow leaks dangerously she is, owing to the height of her center of gravity, very likely to capsize." * * *
>
> "This method of loading was usual and proper, and under the evidence would not cause damage to any vessel reasonably fit for such deck cargo as pyrites.

> *Libelant's scow, although some 20 years old, is shown to have been kept in good condition, and had received a reasonable overhaul only a few months before this accident.''* (This is the showing on which libelant much relies in the case at bar.) *''Yet it is well known that wooden vessels do at times begin to leak with a suddenness and violence quite difficult of explanation.* We have often commented upon the importance of seeing and hearing witnesses, and pointed out our unwillingness to disturb a finding of fact made by the judge, who must have weighed and been moved by the apparent credibility of the men he listened to. In this case, libelant's witnesses describe a style of loading not only improper, but foolish and unnecessary. Their testimony was rejected below, as we would have rejected it, had the testimony been taken by deposition and we had been the first to examine it judicially. It is far more difficult to believe the method of loading asserted by libelant than it is to believe the inference of a sudden leak, which is the only explanation consistent with respondent's testimony.'' (Italics ours.)

The decision in this case cannot be reconciled with libelant's contention in our case that the charterer is bound to show the precise cause of the loss without resorting to inference. Had that been the true rule, the court in *Hastorf Contracting Co. v. Standard Oil Co.,* supra, must inevitably have held that the respondent had failed in sustaining its burden of proof and was, therefore, liable. The action of the trial court, however, in dismissing the libel, and the affirmance of its decree by the Circuit Court of Appeals indicate that the court did not place the charterer under the burden of proof for which appellant in the case at bar contends.

But the Circuit Court of Appeals of the Second Circuit, has gone even further than the *Hastorf* case in clarifying the law. The case of

Hildebrandt v. Flower Lighterage Co., 277 Fed. 436; affirmed 277 Fed. 438 (Nov. 7, 1921),

is, as we have said, truly the last word on the subject. In that case a lighter under charter was returned to her owner in a damaged condition. A tug which had assisted in shifting the lighter was brought in as third party respondent. The charterer (the bailee of the barge) offered evidence to negative charges of negligence in handling the lighter and in stowing the cargo, but he was unable to show the exact cause of damage. The libelant urged that the prima facie case in his behalf could be met by the respondent only by showing how the accident happened—exactly the contention which is made in the case at bar.

In dismissing the libel, Judge Mack of the Circuit Court of Appeals of the Seventh Circuit (who was then sitting in the District Court of the Southern District of New York), explained the applicable rules upon the burden of proof. He first stated the duty of the bailee to exercise ordinary care.

> "Now, as between the libelant and the respondent, the bailee is liable for the exercise of ordinary care; it responds in damages, if it fails to exercise ordinary care in the protection of the property. It is held that in a bailment of this kind the fact that the accident happens, that the damage is done while the boat is in the bailee's possession, that the bailee is not able to return it in good condition subject to ordinary wear and tear, establishes a prima facie case of fault." * * *

Continuing, he squarely denied libelant's contention as to the burden of proof:

> "In other words, it is up to the bailee to rebut the prima facie case; that is, to explain the situation. *I cannot agree with counsel that the prima facie case can be met only by showing how the accident happened. In my judgment, the true principle of law is that the burden of proof is on the libelant to establish negligence; that that burden is prima facie met in the case of a demise by showing the failure to return in good condition, subject to ordinary wear and tear. That puts upon the defendant the burden of going forward with evidence to show a lack of negligence on its part. But, when all the evidence is in, the court must weigh the situation and say: Was the respondent guilty of negligence or not?*" (Italics ours.)

Then, considering the proof offered in the case, he said:

> "Now, what is shown in this case? It is shown that the defendant acted properly, so far as it is concerned, in the handling of the boat, in the loading of the cargo on the boat. It did nothing, so far as the evidence shows, that can be called negligence, and everything that it did do is shown. It is immaterial whether, if the master had been present, the accident would not have happened, because the respondent is not liable for the master's being absent. In so far as that would have any bearing on the case, it would be a responsibility of the libelant. I am assuming, because I believe that the evidence sustains it, that the boat was in seaworthy condition when it was handed over to the respondent. It follows, therefore, that the damage occurred after it was handed over to the respondent. That reduces the inquiry to this: Was the respondent guilty of negligence, by which that damage occurred? As I say, if there were no proof at all, except the handing over, for the failure to return

> they would be liable; *when there is proof of just what was done, even though the cause of the particular damage is not shown, the burden of showing negligence remains on the libelant.*
>
> In my judgment, that burden has not been met; there has been no showing of negligence.'' (Italics ours.)

The significant thing about the opinion of Judge Mack (who came from the Seventh Circuit) is that it unquestionably expressed the views of the Court of Appeals for the Second Circuit. The opinion of Judge Mack is dated June 19, 1919. The judgment was affirmed on November 7, 1921, by the Circuit Court of Appeals of the Second Circuit, without opinion, the opinion of the lower court and the decree of affirmance being printed together (277 Fed. 436 and 438). It is most significant that Judge Rogers, who wrote the opinion in the *Schoonmaker* case (on which libelant here practically stakes its case), is the judge who, with Judges Manton and Mayer, adopts the opinion of Judge Mack in the *Hildebrandt* case and adopts it in November, 1921, a year and a half after the *Schoonmaker* case, which was decided in June, 1920. The publication of the trial court's opinion with the decree of affirmance, after the lapse of more than two years, manifestly indicates that the Circuit Court of Appeals approved and adopted the reasoning of Judge Mack in the lower court. Obviously, the lower court's opinion so clearly expressed the views of the upper court that a written opinion by the latter court was found unnecessary. No other conclusion is tenable.

As Judge Rogers, who wrote the opinion in the *Schoonmaker* case, sat in the *Hildebrandt* case, it is not thinkable that the court could have overlooked the *Schoonmaker* case on which libelant chiefly grounds its present appeal. The owner of the lighter in the *Hildebrandt* case presented in the Circuit Court of Appeals the very point urged by the appellant in the case at bar. To this point the lighter owner's brief* says:

> "The liability of the bailee as laid down in the case of Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co., 168 Fed. 533, is clear. Circuit Judge Noyes held the charterer was under an obligation to show, first, how the injury occurred, and second, that it was free from negligence. It may be true that this may work a hardship in some cases upon the charterer, because although he may show that he did not cause the damage, yet he is liable because he is unable to say just how the accident occurred."

It is to be noted, too, that the case relied on in the foregoing passage is *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.,* 168 Fed. 533. The court will observe by reference to the opinion in the last cited case, that it in turn discusses the case of *Swenson v. Snare & Trist Co.,* 160 Fed. 469.

These two cases (the *Terry* case and the *Swenson* case just cited) are, with the *Schoonmaker* case, supra, the authorities on which appellant relies in this appeal on the point now under discussion. These authorities were all, as we have just shown, before the Circuit Court of Appeals for the Second Circuit, and the point urged on this appeal, with these authorities, was there

*We have printed the entire brief as an appendix to this brief.

presented. That the point was also presented to Judge Mack and disallowed by him, in the trial of the *Hildebrandt* case is shown in the passages we have quoted above (and see the opinion in 277 Fed. at page 437, particularly).

We take it, therefore, that the approved rule of law in the case of a demise charter is that the burden of proof is primarily on the libelant to establish negligence; that that burden may be prima facie met, in the case of a demise, by showing a failure to return in good condition (ordinary wear and tear excepted); that the respondent is then under the duty of going forward with the evidence to show what happened; but that when all the evidence is in, the question for the court is whether it is persuaded that the respondent is guilty of negligence; and when the respondent offers persuasive proof showing his lack of negligence, even though the cause of the particular damage be not shown, the burden of showing negligence remains with the libelant.

Judge Dooling did not have the benefit of the opinion in the *Hildebrandt* case when he decided this case, for the *Hildebrandt* case was not reported until March 23, 1922, but it is apparent that his mind marched with Judge Mack's. He found that the "Crowley 76" was not overloaded and was properly loaded; the issue being whether or not the respondent was guilty of negligence and, the burden being on the libelant to prove negligence, he dismissed the libel, for he thought it just as likely that the loss was caused because the barge, being old, leaked. The rule stated by Judge Mack upon the

burden of proof resting upon parties is clearly that applied by Judge Dooling. In other words, he was not persuaded that the libelant was entitled to recover. The "risk of non-persuasion", using Wigmore's illuminating phrase, was with the libelant. Libelant having failed to meet this primary burden of proof, the court properly dismissed the libel.

This disposes, we think, of appellant's contention that the Court erred as to law applicable to the case. The only question remaining for consideration is whether the evidence supports the decision of the trial court.

II.

THE EVIDENCE AMPLY SUSTAINS THE DECISION OF THE TRIAL COURT.

We believe we have shown that no error of law enters into this case. The appeal is really from the Court's decision upon the facts. The question before this court is, therefore, whether there is sufficient evidence to support the findings of the trial court. Under the rule to which we have previously referred, the judgment should be affirmed unless it is manifestly contrary to the evidence. A review of the evidence will demonstrate, we venture to suggest, that the judgment so far from being manifestly, or indeed at all, contrary to the evidence, is in accord with it.

The specific charges of negligence against the respondents upon which evidence was offered and con-

sidered in the briefs in the trial court or on the appeal, are:

(a) Overloading;
(b) Improper loading, including failure to trim the barge;
(c) Improper mooring of the barge to the "Monongahela" and (for the first time on the appeal);
(d) Failure to avoid loss by cutting the lines which held the lighter to the bark.

The evidence on these points will be considered in the order indicated.

(a) The lighter was not overloaded:

The trial court found that it was not established that the lighter was overloaded. And the evidence shows that it was not.

The "Crowley 76" was chartered to carry 400 tons of sand ballast. In the nature of things it is impossible to say that the ballast was weighed ounce by ounce as it was taken from the "Monongahela". The owner and the charterer were both obliged to offer to the court methods of determining the weight of the ballast put on the lighter which were not based upon actual measurement of the ballast by the scales as it went into the lighter. The appellant's method was that of addition and multiplication; appellees' was by subtraction.

Amount loaded as computed by buckets (libelant's computation).

The appellant introduced testimony to the effect that 546 buckets, each weighing 2200.5 pounds, were put on the lighter (Messick, Dep. Apostles, pages 226-227).

According to this method of computation the sand on the lighter weighed 600.7 short tons. The accuracy of the total depends, of course, upon the accuracy of the multiplicand, as well as the multiplier. If the buckets did not run uniformly full, the total is bound to be incorrect. Messick, who was in charge of the loading of the buckets, testified that the buckets were loaded full (Apostles, pp. 241-242). Jones, one of the stevedores who worked in the hold, said "they were well filled, at least the ones *I* was working on were well filled all the time" (Apostles, page 58).

Captain Scott, who was port superintendent for Struthers & Dixon, the operators of the "Monongahela", contradicted this testimony. He watched the discharge of the ballast to the barge off and on a good many times a day during all the time the lighter was there. He testified as follows (Apostles, page 140):

> "Q. Did you have occasion, in the course of your duties as port superintendent of Struthers & Dixon, to be in and about the 'Monongahela' during the discharge of ballast on to the barge?
>
> A. Yes, sir.
>
> Q. During all the time that she was discharging, off and on?
>
> A. A good many times a day during all the time she was there.
>
> Q. Did you observe the buckets as they came out of the hold of the barge? A. I did.
>
> Q. What was their condition as to the amount of the ballast in the buckets?
>
> A. When they first commenced to discharge the buckets were pretty well filled; later, as they took it out from the wings and back from the square of the hatch, a great many of them were only half full."

James Woodside, superintendent of the San Francisco Stevedoring Company, which loaded the barge, testified as follows (Apostles, page 168):

> "Q. During the time that that ship was being discharged, you were there often, were you?
> A. I was on the dock all the time.
> Q. And on the ship?
> A. And on the ship three or four times a day.
> Q. Did you notice the buckets as they came out of the ship, with respect to the amount of sand in them?
> A. Yes, I had to keep after the men all the time, they didn't fill the buckets.
> Q. They did not run full?
> A. No. From two-thirds to three-quarters."

A donkey engine on the dock beside the "Monongahela" supplied the power by which the buckets were hoisted from the hold and their contents dumped on the lighter. It was operated by Marvin Brooks. He was better qualified than any of the witnesses to give an opinion as to the weight of the buckets. He testified that the buckets did not run uniformly full (Apostles, page 164):

> "Q. What, if anything, do you know about the buckets being full or not full?
> A. Some of the buckets were loaded full, I know from the way the engine pulled, and some were loaded not so full. When I would go to take an empty bucket out, without any sand in it at all, the engine would run fast and you could tell the way it was pulling."

The respondents, however, did not depend merely on showing that the libelant's figures were based on faulty premises, but showed the amount of sand put on the

lighter by a method of computation on the reasonable accuracy of which the safety of life and property were dependent.

The amount loaded on the lighter according to the ship's displacement scale.

The "Monongahela" sailed from Manila to San Francisco in ballast. She carried 800 metric tons of sand ballast, equal to 1,763,200 pounds (Apostles, pages 134, 136, 176). As she was to sail from San Francisco with cargo, it was necessary to remove part of her ballast,, but her captain desired that at least 400 tons should be left in the ship, and the marine surveyor gave orders to this effect. This appears from the testimony of Captain Armstrong (the master of the "Monongahela"), Captain Scott (port superintendent of Struthers & Dixon, the operators of the ship) and Captain Mills, the marine surveyor. Captain Scott testified as follows:

> "Q. Do you remember the discharge of sand ballast from the vessel 'Monongahela' on to the 'Crowley Barge No. 76'? A. Yes, sir.
>
> Q. Did you arrange for the employment of that barge? A. I ordered the barge, yes, sir.
>
> Q. What was the arrangement
>
> A. I called up Crowley and ordered a barge to handle the sand ballast. There was nothing said about the price, they had regular schedule prices.
>
> Q. What was the amount of sand ballast that you specified that you wished to unload?
>
> A. 400 tons.
>
> Q. What was your reason for desiring the removal of that much sand ballast?
>
> A. The ship had 800 tons of ballast in her. Our surveyor——
>
> Mr. Thacher. —May I ask that the witness be instructed to testify to what he knows, rather than

to what he was told? I think the statement as to how much ballast there was in the ship is purely hearsay.

Mr. Griffiths. Q. Is this document from your office records, Mr. Scott?

A. Yes, that is from the office in Manila, where the ballast was purchased.

Q. And that is in your office files now, is it, here in your office? A. Yes, sir.

Q. Now, tell us what it is.

A. 800 metric tons sand ballast supplied and put on board the ship 'Monongahela'." (Apostles, pp. 134, 135.)

Captain Armstrong testified to the same effect:

"Q. From what port had she (the 'Monongahela') come? A. From Manila.

Q. Did you come with ballast from Manila?

A. Yes, sir.

Q. How much ballast did you take at Manila?

A. Eight hundred tons.

Q. How much ballast did you desire to have discharged here, or, rather, how much did you desire to have left in the vessel before sailing?

A. I aimed to have a little more than 400 tons in the vessel.

Q. Were those your orders to your operators?

A. Yes, sir." (Apostles, p. 157.)

Captain Mills' testimony was as follows:

"Q. Captain Mills, what is your business?

A. Marine surveyor.

Q. Here in San Francisco? A. Yes, sir.

Q. Were you the surveyor in the discharge of the ballast of the 'Monongahela' in December, 1919?

A. I was surveyor on the ship for the discharging of the cargo and the loading of the cargo.

Q. Did you make a surveyor's report?

A. I did.

Q. Is this a copy of the report that I show you here now? A. It is.

Q. Does that show the mean draft of the vessel upon completion of discharge of the ballast?

A. It does; it shows the draft at each end of the ship; the mean would be the division of the two.

Q. Did you have instructions as to how much ballast should be left in the vessel?

A. I did; not only did I have instructions, but I gave instructions.

Q. What were they?

A. Not less than 400 tons were to be left on board." (Apostles, pp. 173, 174.)

Appellant's counsel quarrels with this method of estimating the amount of ballast on board the "Monongahela". We submit that it is a check, the accuracy of which cannot be reasonably questioned. The testimony of the captain of the ship, who ordered the ballast in the amount needed, the testimony of the man who handled and paid the ship's disbursements, and the presence among the ship's accounts of a receipted bill for 800 tons of sand, are persuasive that this was the amount of ballast on the "Monongahela". It was put on board the "Monongahela" because it was necessary to her safety in sailing from Manila to San Francisco, long prior to litigation, and not for purposes connected with this suit.

Starting, then, with the "Monongahela's" ballast at 800 metric tons (equaling 1,769,200 pounds) the quantity taken off and placed on the "Crowley 76" is arrived at by computing the amount of ballast left on board the ship after the lighter was loaded according to the ship's displacement scale. The subtraction of the last amount from the first gives the amount loaded on the lighter.

Captain Mills, the ship's surveyor, shows the method of computation:

"Q. On the afternoon of December 15, toward the close of the discharge, did you calculate the ballast then left in the vessel? A. I did.

Q. With Mr. Scott?

A. Mr. Scott, and Captain Armstrong, and Mr. Miller—I won't be sure about Mr. Miller, but with Mr. Scott and Captain Armstrong.

Q. How did you make your calculations?

A. By the displacement scale on the ship.

Q. And does your survey report here show the ballast left in the vessel? A. It does.

Q. What does it show? A. 430 tons.

Q. Long tons?

A. Yes. The displacement scale is figured on long tons.

Q. You worked that out by the use of the displacement scale in reference to the draft, did you?

A. I did.

Q. Will you explain to the court your calculation? Have you a memorandum you can use and show the court how these calculations are made? Can you make the calculations here?

A. I made a memorandum.

Q. Have you got it with you?

A. I think I have, yes.

Q. This is something you have made up in the last few days by using the surveyor's report and the displacement scale? A. Yes, sir.

Q. Will you explain to the court how you arrived at the number of tons of ballast which were left in the vessel, or taken out, as the case may be —taken out, if you have it worked there?

A. The displacement scale would show that. This was taken from the displacement scale by her draft showing at that time that she had 475 long tons.

Q. Yes, I understand that, but I want you to go right through the calculation here.

A. Then, with the ship's stores and the dunnage that were left on board—the stores would in-

clude the provisions, and the ropes, and the sails, etc., and the dunnage, there was a large amount of dunnage on board I estimated about 50 tons, not to exceed 50 tons at the outside; that was a maximum; I usually make my figures on maximum amounts; 50 tons from that would leave 425 tons of ballast left on board the ship." (Apostles, pp. 174, 175.)

On cross-examination Captain Mills testified as follows:

"Q. You made the surveyor's report out, as I understand you, you made it out on December 22nd, the day it is dated? A. Yes, sir.

Q. This was the date on which you made up these various figures; when did you check the draft?

A. I took the draft when she was finally discharged, when all the ballast was taken out preparatory to loading.

Q. Was that around December 22?

A. That was prior to that.

Q. Prior to that?

A. Yes, it was four or five days prior to that.

Q. Do you know just when?

A. I think somewhere about the 15th or 16th; I have no notes on that.

Q. According to this, when she was ready to load she had 8 feet 8 inches forward and 11 feet 8 inches aft; that is correct, isn't it?

The COURT. 10 feet 2 inches.

A. 10 feet 2 inches was the mean draft.

Mr. THACHER. Q. What was it aft?

A. 11 feet 8 inches aft, and 8 feet 8 inches forward; we trimmed the vessel 3 feet by the stern." (Apostles, pp. 178, 179.)

On the deposition taken after the trial, Captain Mills corrected his testimony to say that at a mean draft of 10 feet 2 inches the total amount of ballast and supplies on board the "Monongahela" would be 525 long tons

(Mills' Deposition, Apostles page 287). Captain Ludlow and Captain Smith, corroborating the testimony of Captain Mills, also testified that at a mean draft of 10 feet 2 inches the total amount of ballast and supplies on board the "Monongahela" would be 525 long tons (Apostles, page 273, page 279).

The amount of ballast placed on the lighter is thus computed as follows:*

(Mean draft of vessel after discharge of ballast 10′ 2″.)

Ballast on board at Manila	800 metric tons	=1,763,200	pounds of ballast.
Supplies, stores, ballast, etc., left on board ship after ballast was put on lighter, according to ship's displacement scale (Mean draft 10′ 2″)	525 long tons		
Supplies, stores dunnage	50 long tons		
Ballast left on board	475 long tons	=1,064,000	
Ballast put on lighter		699,200	pounds of ballast or 349.6 short tons placed on lighter or 312.1 long tons.

The original computation as given at the trial was as follows:

Ballast on board	800 metric tons	=1,763,200
Supplies, stores, ballast, etc., on board ship, after ballast was put on lighter	475 long tons	
Supplies, stores, dunnage	50 long tons	
Ballast left on board	425 long tons	= 952,000
		811,200

or 362.6 long tons placed in lighter, or 405.6 short tons.

The estimate of the ship's stores at 50 tons was a conservative estimate by Captain Mills (Record, p. 175), and Captain Smith gave his opinion that this was a moderate estimate (Apostles, p. 280).

Libelant's counsel in their brief refer to this computation of the amount put on board the lighter as: "The Captain Mills' Theory" (brief, page 33).

Why this nomenclature! The amount of ballast put on the barge was an important issue in the case. The libelant and the respondents were both compelled to offer to the court some method of computing this amount, not based on the weighing of the ballast, ounce by ounce, as it went over the ship's side. Their method is the stevedore's tally of the number of buckets, multiplied by the estimated weight of each bucket. Ours is by subtracting from the amount of ballast on the "Monongahela" before the discharge began, the amount left after the discharge was completed. The difference is the amount that was placed on the lighter.

The data on which our computations were based was that on which the ship was being ballasted and thus her seaworthiness for a contemplated voyage tested. The safety of the men and property aboard her depended on the reasonable accuracy of these computations and as Judge Dooling remarked in reference to the displacement scale on which the calculations were based:

> "This is the scale they were using, and on which they were sending this ship to sea. It was not made for the purposes of this case; it was made for the purposes of the ship. * * * If they sent their

> cargoes and their captain and their men to sea on this scale, it is at least valid enough to go into evidence here." (Apostles, p. 186.)

It would be just as proper (or improper, according to the point of view), to refer to appellant's computation as "Foreman Messick's Theory" as it is for appellant to denominate ours "The Captain Mills' Theory".

Libelant challenges the accuracy of respondents' figures as to the amount loaded, by pointing to certain enlargements of photographs made by the witness W. W. Swadley on the day after the "Crowley 76" overturned. The photographs made by Mr. Swadley, taken the day after discharge was completed, are offered as proof that the draft aft of the "Monongahela" after the ballast was discharged, was not 11′ 8″, but about 10′ 8″, and that therefore, in calculating the mean draft of the vessel Captain Mills made an error of six inches. The testimony shows that each inch in the mean draft represented about 25 tons deadweight on the vessel, and that such an error of six inches in calculating the mean draft would mean that there were 150 tons of ballast taken out of the vessel in excess of Captain Mills' calculations.

First of all appellant says that it is obviously impossible for deadweight capacity to be closely calculated by a man standing on the ship's deck looking down at her draft marks at the bow and stern exposed to the lap of the waves, and that this at best can only be a rough approximation. Appellant is we believe mis-

taken in the suggestion that Captain Mills stood on the *deck* to get the vessel's draft marks? On page 34 of their brief appellant says that Captain Mills testified that:

> "By looking from the *dock* he saw the draft of the ship to be 8′ 8″ forward and 11′ 8″ aft."

This was the fact. He did so testify (Apostles pp. 288, 289). Captain Mills got the ship's draft fore and aft from the dock, where Mr. Swadley, the photographer, got the photographs showing the draft. The lens of the human eye was therefore in just as favorable a position for estimating the draft as was the photographic lens on which appellant relies to overthrow Captain Mill's calculations.

To compute to a nicety the draft of a vessel as it is indicated by photographs is not easy. The lens photographs the picture at one instance of time. It cannot show the true size of the subject, nor can it give the variation of a moving object from instant to instant. First of all, the scale of the ship's marks needs explanation. The court will observe the height of the figures on the side of the vessel, and the marks indicating the draft. The height of each figure on the side of the vessel was 6″ and the interval between the figures was 6″ (Ludlow Dep. Apostles p. 274). The dark line in the pictures at the top of the Roman numeral "XI" is a wet line made on the ship's hull, which is made by the wash of the sea against the vessel. Whenever the waves are lapping the hull keeps

wet (Swadley Dep. Apostles pp. 264, 265). Mr. Swadley testified that the lapping of the water against the ship on the morning he took the picture, amounted to only 3″, for it was an exceedingly calm smooth day (Apostles, p. 265). He testified that his lens would not photograph a numeral below the water line (Apostles p. 263).

If the two pictures that were offered for the trial court's scrutiny be observed it will be noted that in Exhibit "A" the figure XI is about half way out of the water; that in Exhibit "B" it is entirely out of the water, but with no space to spare; that is to say, the actual water line appears to have been exactly at the base of the figure. In each picture the dark streak or line of the water's wash against the ship is almost at the top of the numeral XI. As the water washed against the ship therefore, the figures indicating the draft of the vessel would have varied from 11′ to 11′ 3″. Allowing for the mean of the wash against the vessel the draft of the vessel aft, if it is estimated according to the photographs, could not have been more than 11′ 1″ or 2″. The draft of 10′ 8″ given in appellant's brief at page 37 is obviously an exaggeration. If the draft aft be taken to be 11′ 1″ or 2″, then the mean draft would be about 9′ 11″, for the draft forward was 8′ 8″. As was explained by the witness, Captain Ludlow, each inch on the displacement scale represented 24 or 25 tons (Apostles, p. 274). At a mean draft of 9′ 10½″, the vessel's deadweight contents would be 465 tons (Ludlow Dep. Apostles, pp. 273, 274). The computation of the amount of

ballast taken off the ship and put on the lighter would then be made as follows:

800 metric tons
of ballast = 1,763,200 pounds
Total amount left
on board 465 tons
Supplies etc. 50 "

Ballast left
on board 415 " = 929,600

833,600 pounds =372.1 long tons,
or
416.5 short tons
put on
lighter.

Even if we were to take the photographs as representing correctly the draft aft of the ship at the time the ballast was unloaded, it is apparent that the lighter, if fit for the work, should, according to libelant's witnesses, have been able to carry the sand easily.

It may be fairly questioned, however, whether the computation just given is correct. It is accurate only upon the premise that the photographs represent accurately the draft as it was taken on the afternoon of December 15th by Captain Mills. Mr. Swadley's photographs were taken on the morning of December 16th, sixteen or eighteen hours later. If during the interval anything occurred to change the relation of the draft aft and forward towards each other, the draft aft

might show a difference on the photographs from its measurement the afternoon before, but without any change at all in the mean draft; that is to say, a draft aft of 11′ 1″ or 2″ might indicate a lightening at the stern and an increasing of the draft forward, *the mean draft remaining the same.*

To sum up: The mean draft of the ship, after completion of discharge of the sand ballast, was estimated by her surveyor at 10′ 2″. This was a calculation made, before the injury to the lighter and not for the purposes of this suit. It was made to estimate the amount of ballast left on board the ship, which was necessary for the due safety of life and property. It was the draft on which the "Monongahela" was going to sea. None of the appellant's evidence and none of the arguments based thereon, have off-set or contradicted this—the mean draft of the vessel was 10′ 2″. We think, therefore, that the court should take the figure 10′ 2″ as the vessel's mean draft and upon this basis accept the calculation given on page 38 supra, showing the amount of ballast put on the lighter to have been 349.6 short tons, or 312.1 long tons.

(b) The lighter was properly loaded.

The method adopted in loading the "Crowley 76" was entirely proper.

The buckets went out from the ship's side on the yardarm or boom and were suspended so as to be amidships of the lighter. The sand was discharged at first just forward of the center of the lighter. The lighter was shifted from time to time, however, the

work moving aft, thus allowing an even distribution of the sand on the deck of the lighter. Four distinct cones were thus built up (Apostles, pp. 55, 161, 162, 226).

This method of loading was approved by men of long and successful experience in stevedoring. Captain Bennett, vice-president and manager of the California Stevedore & Ballast Company, approved it (Apostles, p. 149). So did Mr. Wieder, a superintendent in the employ of the Peterson Tugboat Company (Apostles, p. 172), and Mr. Hazeltine, president of the Pacific Stevedore & Ballast Company (Apostles, p. 159). So did libelant's witness Captain Langren (Apostles, pp. 200, 201). The witness David Crowley said positively that loading barges in cones was not the customary method, and was improper, and that loading them flat was the proper way (Apostles, p. 7)). But he was the only witness on behalf of either party who so testified. Another of libelant's witnesses, Wilder, the Superintendent of the Crowley Company, testified that loading in cones was a proper method, and in fact, in his opinion, the preferred method of loading (Apostles, p. 94).

This testimony would be conclusive as to the propriety of respondents' method of loading, quite apart from the testimony of libelant's witness, James Sennott. Mr. Sennott was the outside man of the Crowley Company. It was his work to keep an eye on the lighters and barges of the Crowley Company while they were in use at the different docks and points in the harbor, and to see that nothing went wrong with them. He went all over the "Crowley 76" on Saturday while she

was being loaded, was on her decks, went down into her hold, and went off without making any observations or criticisms or suggestions to those in charge of the loading (Apostles, pp. 97 and 98). He was on the barge again on Sunday, by which time the greater part of the discharging was done, and apparently approved of what he saw, for he went off without any fault finding (Apostles, pp. 98 and 99).

There is no evidence that the lighter was listing prior to Monday afternoon, the afternoon of the accident. One of the stevedores, the witness Jones, testified that on Monday morning the barge was on an uneven keel (Apostles, p. 55), but he later testified that when he helped to shift her at 12 o'clock she moved very freely and that at two o'clock, when she was shifted again she was on an even keel (Apostles, p. 67). Mr. Sennott, who was on the "Crowley 76" Sunday morning, testified that the barge was all right then; that there was nothing to complain of and that she was then in a safe condition (Apostles, pp. 98, 104, 105 and 107). Mr. Wilder himself watched the loading of the barge on Saturday afternoon for awhile and found no fault (Apostles, p. 83). Mr. Wieder, the superintendent of the Peterson Tugboat Company, testified that at nine o'clock on the morning of the 15th, Monday, the day of the accident, the barge was riding on an even keel (Apostles, p. 171). Captain Scott, Struthers & Dixon's port superintendent, was in and about the "Monongahela" during all of the time of the discharge of the lighter. He testified that she was riding on an even keel as late as three-thirty o'clock, Monday afternoon

(Apostles, pp. 141, 142). The witnesses, Crowley and McAndrews, saw the "Crowley 76" at about four o'clock Monday afternoon, and they testified that at this time the barge had begun to list. She turned over at about 4:40 o'clock.

Appellant's counsel have urged that nothing was done to trim the barge.

What is meant by "trimming"? Webster's dictionary defines the verb "to trim" "in a nautical sense" as follows:

> "To adjust to a position in the water, as a ship or small boat, by arranging the ballast, cargo or persons, especially on each side of the center and at each end, that she shall sit well on the water, sail well, etc."

Can it seriously be contended that when sand ballast is loaded on a lighter in the fashion we have described, that a special operation called "trimming the barge" is necessary? Is there peculiar magic, anything sacrosanct in the word "*trim*"? What is the purpose of building up cones at intervals on the barge; of shifting the barge from time to time as the sand is dumped on it, if not to trim her? What sort of material was it which was being dumped on the "Crowley 76"? The witnesses all described it as "sand ballast". Libelant's own witness Charles Messick said:

> "The gravel was loose enough to spill over the edge of the bucket if the bucket was too full, or if the bucket was jarred." (Apostles, pp. 241-242.)

It will be remembered that this sand ballast had been shoveled out of ship's hold into buckets before

the buckets were shot over the boom and their contents dropped on the lighter. Are we to believe that this material was so hard and so packed that it could be dug from the hold of a ship, shoveled into buckets and then dumped from the buckets on to the deck of a lighter below without spreading? What did libelant's witness Wilder mean when, in answer to the court's question: "What is your idea of correct loading, Mr. Wilder"? he said:

> "A. Well, the proper way to load sand on a barge of that kind is to carry it along evenly.
> Q. To build a cone five or six feet high and then move the barge, and then another?
> A. Yes, and carry it right along, and work back again; *then you keep your barge in trim,* and there is no danger." (Apostles, p. 94.)

Now, we think this language of the witness supports the conclusion which one naturally would draw from the testimony of all the witnesses put together upon the proper method of loading a barge. Gravel and sand in themselves have a tendency to spread. Naturally, as the material was dumped, it would spread out and as more buckets were dumped the base of the cone would spread more and more. The evidence shows that the ballast was not piled in one cone, but that the lighter was moved frequently to build up other cones. For example, on the day of the accident the barge was shifted at 12 o'clock and again at two o'clock (Apostles, pp. 66 and 67). This was all in accord with the approved and customary method of loading. The result of this would be an even distribution of the weight of the ballast over the barge. The method of loading itself provided

for trimming the barge. The fact that on three occasions representatives of the Crowley Company observed the method in which the barge was being loaded and trimmed and yet had no criticisms to make is strongly persuasive that respondents were not subject to criticism. It is also indicative of some doubt or fear on the part of the Crowley company concerning the barge's capacity and strength.

We have then the case of a barge, chartered to carry a particular kind of cargo, and a particular amount of cargo. The kind of cargo for which she was chartered and the amount for which she was chartered was put on the barge according to approved methods of loading. Nevertheless, the barge began to leak, to list and eventually to overturn. What was the cause of it? This brings us to a consideration of another point urged in the trial court, upon which some testimony was offered, viz.: that the barge was held tightly by a steel cable and strong hawsers against the side of the "Monongahela". Appellant's brief on appeal does not consider the point urged in the brief in the court below that appellants were responsible for the manner in which the barge was tied to the side of the ship.

We shall consider this point briefly.

(c) The libelant was responsible for the method by which the lighter was fastened to the ship.

It was suggested in the court below, and possibly may be urged in the oral argument on the appeal, that the lighter was improperly moored to the side of the ship. She was fastened by four lines to the outboard

and inboard bitts, and libelant was itself responsible for this manner of making her fast to the ship. Mr. Wilder, the superintendent of the company, testified that when the lighter was sent over to the "Monongahela" Tuesday evening, a Crowley employee was sent with the lighter with lines belonging to the Crowley Company, for the purpose of tying the barge to the ship. Next day he went all over the lighter and re-fastened the lines himself. He testified, on direct examination:

> "Mr. Thacher to Mr. Wilder. Q. After she went over to the 'Monongahela' job, Mr. Wilder, when did you next see her?
> A. The following morning.
> Q. That is, Wednesday?
> A. That is Thursday morning, I saw her.
> Q. What were the circumstances of your seeing her; from where did you see her?
> A. Took a look at her again, went down below; when we put her in that evening, it came on to blow, and one of our deck hands, I did not think, made her fast properly, so I refastened her, went below again, and everything looked O. K. to me." (Apostles, p. 82.)

Later Mr. Wilder in the course of cross-examination, when questions were being asked by Mr. Griffiths, Mr. Thacher and the court, alternately, testified thus:

> "Q. Did I understand you to say that when the barge came over there the first time, one of your deck hands made her fast to the ship?
> A. Yes.
> Q. With whose ropes, yours or the ship's?
> A. My own, first.
> Q. Where did you fasten her, to the out-board bitts?
> A. Yes.
> Q. And to the in-board bitts, too?

A. Yes.

Q. And you did that, that is, your man did that?

A. Yes.

Mr. THACHER. Q. Were you there?

Mr. GRIFFITHS. Wait a minute. You can take him on cross-examination. He testified one of the deck-hands made her fast.

Mr. THACHER. I think this is hearsay.

Mr. GRIFFITHS. You took it on direct examination.

Mr. THACHER. Just ask him what he saw in regard to the tying of the lines, because I do not think he was there when the barge was brought over.

The COURT. He said he was there when the barge was brought over.

A. No.

Q. You said you were there Tuesday night when one of the deck hands made her fast.

A. I said one of our deck hands did; we sent him over for that.

Q. You don't know who fastened it?

A. That is what we sent him along there for.

Q. Then you suppose he fastened it?

A. I suppose so.

Q. I got the impression you were there and saw it.

A. No.

Mr. GRIFFITHS. It is customary for you to send deck hands to fasten your barges; that is what you base your answer on?

A. Yes.

Q. You did send deck hands along with this barge to fasten it to the 'Monongahela'?

A. We sent one, yes, but after leaving the barge there, we generally leave the barge in the care of those on the ship.

Q. But you took her there and you fastened her, didn't you?

A. He did, yes.

The Court. You say, 'he did'; you don't know whether he did, or not. I could just as well say he did as you can. How do you know your man fastened it?

A. That is what we sent him there for, that is all; he fastened the line to the vessel." (Apostles, pp. 89, 90, 91.)

From Mr. Wilder's testimony taken as a whole it is quite apparent that on the evening the lighter was taken to the ship one of the Crowley deckhands was sent to fasten her, and that Mr. Wilder himself went over the lighter the day after she was taken to the ship and refastened her himself. Mr. Sennott, the Crowley Company's outside man, was on the lighter Saturday and Sunday and made no objection to the method in which she was moored.

"Q. When you saw the barge on Sunday, how was she moored to the side of the vessel?

A. There were four lines on her, two on the inshore and two on the offshore; one was a wire cable.

Q. You were on the 'Monongahela' at that time?

A. On Sunday?

Q. Yes.

A. Yes, I was aboard of her.

Q. Did you suggest any objection to that method of mooring to the ship?

A. No, I did not.

Q. Did it seem all right to you?

A. The barge was all right then.

Q. And you had no criticism to make at that time?

A. No, not at that time." (Apostles, p. 101.)

The way in which the barge was moored to the ship was the libelant's way, and of its doing.

(d) The respondents were not at fault for not cutting the lines which held the lighter to the ship.

It is further urged in libelant's brief, that the ultimate cause of the lighter's loss was the fact that her lines were not cut after the lighter began to leak and list. It is argued that if the lines had been cut, the "Crowley 76" would have swung clear from the "Monongahela"; would have dumped her load and would have remained unhurt; and that, eliminating all the other evidence, the charterers were liable for their failure to cut the lines and let the barge dump her load.

It will be remembered that the barge did not begin to list, as nearly as can be calculated, until about four o'clock. Her destruction occurred at 4:40. There were forty minutes, then, in which action could be taken to save the barge. If it be conceded that the respondents were not at fault in their previous management of the barge and were not responsible for the barge's leaking and listing, then they can only be liable for failure to use ordinary care thereafter. Did the respondents fail to use ordinary care? What should they have done? Cut the lines, or make an attempt to pump out the barge? Libelant now says, after the event, that by all means the lines should have been cut. But what was the judgment of libelant's men who were on the ground at the time? Mr. McAndrews said the thing to do was to pump her out. He testified as follows:

> "Q. What would be the effect of the stern going down that way?
>
> A. It would carry away the lines.
>
> Q. What about the effect on keeping the water out?

A. *The only way you had to do, was, to try to righten her stern up, to get a pump on it, to keep the water out.*

Cross-Examination.

Mr. Griffiths. Q. If you saw water coming into her, the thing to do would be to pump immediately?

A. Certainly, if they had a pump there." (Apostles, p. 108.)

Apparently Mr. Crowley's judgment was the same, for when he came to the conclusion that he did not like the position the barge was in against the ship, with a southeast wind coming up, his first idea was to telephone to his office to Mr. Wilder to "come over with something and try to straighten the barge up" (Apostles, p. 70).

It seems obvious to us that if this was the judgment of the Crowley people as the best way to right the barge in the emergency, the respondents cannot be charged with negligence because they did not take another and a different method to save her.*

Considering all of the testimony together as to the character of the barge, the character and the amount of ballast loaded, and the mode of loading it, is there sufficient evidence to justify the trial Court in concluding that the libelant failed to make out its case? What is the most reasonable explanation of the loss of the

*The libelant has stressed the fact that the mate of the "Monongahela" was not a witness. This is not a case where the testimony of any one witness was necessary for the correct disposition of the case. Upon the points on which the mate could have testified, the manner of loading and vessel's draft, respondents produced witnesses as equally able to testify as the mate. The presumption to which libelant refers is not applicable where the witnesses' testimony is merely cumulative. 22 Corpus Juris. 117-118.

barge? The trial Court thought it probable that the barge, being old, had sprung a leak and that, her equilibrium being disturbed, she began to list and finally to capsize. As Judge Hough pointed out in *Hastorf v. Standard Oil Company,* supra, it is notorious "that wooden vessels do at times begin to leak with a suddenness and violence quite difficult of explanation."

Putting all the evidence together, it is clear that the conclusions of the trial Court were in accord with the evidence. If, as respondents contended, and as the Court concluded, the lighter was not overloaded and was properly loaded, but nevertheless, without any fault on the part of respondents, the barge, being a wooden one, and an old one, began to leak because of her age or from some unknown cause, then the resulting accident was not to be charged to the fault of respondents. In the absence of negligence on the part of respondents, the accident would arise out of or be incident to the use for which the lighter was chartered. For this appellants were not liable.

In closing we beg to refer to the suggestion (appellant's brief, pp. 45, 46) that unless this court holds with appellant's contention it will be making "a change in the law." That does not truly, we respectfully submit, state the situation. It is appellant, not we, who is urging a change in the law. Appellant is urging that the bailee of a lighter be held an insurer. That is not now the law. Appellant would put the bailee of a lighter in the same category with a common carrier; for a private carrier, this court has held, is not an

insurer and a shipper must prove negligence affirmatively.

The Lyra, 255 Fed. 667 at page 668.

We ask simply that the court sustain the law as declared by the Circuit Court of Appeals for the Second Circuit in *Hastorf Contracting Co. Inc. v. Standard Oil Co.,* 272 Fed. 884, and by Judge Mack in *Hildebrandt v. Flower Lighterage Co.,* 277 Fed. 436, as affirmed by the Circuit Court of Appeals for the Second Circuit in the same case in 277 Fed. 438.

Libelant plead negligence on the part of respondent (Apostles, p. 10 article VI of the libel) and counsel for libelant essayed (opening statement Apostles, p. 49) to show that the lighter was overloaded and badly loaded.

The evidence having been heard, Judge Dooling found that it was not shown that the barge was overloaded, and the evidence as we have reviewed it shows she was not. Judge Dooling found that the barge was not improperly loaded.

Assuming then for argument that libelant made its prima facie case by showing delivery in good order and condition and failure to re-deliver in that condition in accordance with *Hildebrandt v. Flower Lighterage Co.* (277 Fed. 436 at 437, affirmed 277 Fed. 438), we went forward with the proof to explain what happened in accordance with the rules stated in that case. In the end as the Court came to review all the evidence, negligence was found not to have been found against the respondent, respondent's freedom from negligence was shown, and libelant was left in the situation of a moving

party which so far from making its case had had the case made against it, with the District Court finding that the barge was old and that her loss was probably due to her making more water than usual, as in

Hastorf Contracting Co. Inc. v. Standard Oil Co., 272 Fed. 884.

We respectfuly submit that the judgment and decree of the District Court should be affirmed, with costs there and here to respondent.

Dated, San Francisco,
May 10, 1922.

McCutchen, Olney, Willard, Mannon & Greene,
Farnham P. Griffiths,

Proctors for Appellees.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

In the United States Circuit Court of Appeals for the Second Circuit

John Hildebrandt,
Libellant-Appellant,
against
Flower Lighterage Company,
Respondent-Appellee,
Steamtug "President", Clyde Steamship Company,
Appellee.

BRIEF FOR APPELLANT

Appeal from a decree of the District Court, Southern District of New York (Mack, J.) dismissing the libel in an action on contract for failure to return a chartered scow.

FACTS.

The libelant Hildebrandt chartered the scow "Elmendorf" to respondent, Flower Lighterage Company. It was the usual demise charter, the master going with the boat and paid by the owner. While the Flower Lighterage Company had the boat under charter she was placed on the north side of pier 45, Brooklyn, inside the slip and about 50 feet from the bulkhead (fol. 57). She had taken on a partial cargo. Work

was suspended for the night. The master sounded the boat, tied her up safely and then went to the pier office of the Clyde Line and was assured that no steamer was coming in and that his boat was safe for the night, and he thereupon left to get some clothes and other necessaries. He returned the next morning and found the boat sunk (fols. 69-75).

During the night the tug "President" moved the boat, in the absence of the captain, around to the south side of pier 45, and tied her up alongside of another boat (fol. 151), and then went to South Brooklyn, and brought another boat and put her alongside of the "Elmendorf." This was about 9 p. m. (fols. 152-153). At 3 a. m. the "Elmendorf" was found sunk (fol. 153). There was a plank broken in the port bow corner of the boat (fols. 69-72-74), about two feet below the load line (fols. 94-96-106).

Upon raising it was found the cargo, consisting of barrels of molasses, had not shifted (fol. 83). Before this the boat was in seaworthy and good condition (Casey, fols. 59-63; Fox, fol. 113; Hildebrandt, fol. 116; Blomberg, fol. 148; Jarvis, fol. 158). No evidence was offered or could be offered as to just how the accident occurred and the question is upon whom the loss falls.

ARGUMENT.

Point I.

The Flower Lighterage Company, as charterer, is responsible for this unexplained disaster.

Although a man went with the boat, the charter was, under repeated decisions in this court, a demise, and

the charterer was a bailee. The liability of the bailee as laid down in the case of *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533, is clear. Circuit Judge Noyes held the charterer was under an obligation to show, first, *how the injury* occurred, and second, that it was free from negligence. It may be true that this may work a hardship in some cases upon the charterer, because although he may show that he did not cause the damage, yet he is liable because he is unable to say just how the accident occurred.

Nevertheless this is a salutary rule. The owner of the boat is unquestionably free from fault. The charterer controls the movements and has possession of the boat. If it suffices to excuse him that he simply proved his own personal freedom from any act which contributed to the disaster there would be few recoveries and an easy way provided for the charterer to exonerate himself from liability. This would lead to lack of care and precautions on the part of charterers.

Point II.

The tug "President" is likewise responsible.

The boat was left by the master in a perfectly secure place within a short distance from the bulkhead. She was moved without the consent of the master, and when he was not on board, despite the assurances that had been given to him that the boat would not be moved during the night. It is not negligence for a

master, under such circumstances, to leave his boat after properly securing it.

Lewis v. Barber Asphalt Paving Co., 123 Fed. 161, affd. *sub nom.;*

The Thomas Quigley, 130 Fed. 336, Cert. denied 195 U. S. 628.

In the later case the Court (Coxe, C. J.) said (p. 337):

> "She (the tug) should not have undertaken the voyage at all in the absence of the master, but, having done so it was her duty to deliver the 'Stamford' into the custody of some responsible person."

It is probable that this damage occurred while the "President" shifted the "Elmendorf" or in placing the third scow alongside, but manifestly the libelant was in no position to show this. But if the master had been on board and some other vessel had made this small break in the bow of the "Elmendorf" it is a reasonable assumption that the master could have kept the boat pumped out or summoned help which would have prevented her from sinking.

Here again the helplessness of the libelant is apparent. If this tug actually did this damage she would not be apt to admit it.

Cases against warehousemen are analogous. A warehouseman who takes goods from one building where he agrees to store them and puts them in another without the consent of the owner is liable for their damage, although caused by no negligence of his own,

Mortimer v. Otto, 206 N. Y. 89;

the reasoning in which case applies to the case at bar. To the same effect are:

Lilley v. Doubleday, L. R. 7 Q. B. D. 510;
Michaels v. N. Y. C. R. R. Co., 30 N. Y. 564;
Bostwick v. B. & O. R. R. Co., 45 N. Y. 712, 717.

Point III.

The decree should be reversed, both respondents held responsible, execution to issue in the first instance against the tug "President".

Respectfully submitted,
Macklin, Brown, Purdy & Van Wyck,
Proctors for Appellant.

Pierre M. Brown,
Advocate.